

1 and so under *People v. Satterfield*, and that's 66 N.Y.2d
2 796, you were allowed, in fact you're required to think of
3 reasons why Jonas Gelb would not have done this. If you
4 can come up with a reason, any reason, not the actual
5 reason, but any objective credible reason why Mr. Gelb
6 would not have pursued that, then you are required to deny
7 this motion without a hearing. If you have any questions
8 I'll entertain them.

9 THE COURT: Mr. McMahon, why is it that you did
10 not obtain the affidavit from Mr. Gelb? Did he refuse to
11 sign an affidavit?

12 MR. MCMAHON: Judge, Mr. Gelb was quite cagey
13 with me when I called him and asked --

14 THE COURT: Cagey?

15 MR. MCMAHON: Cagey. Which always raises the
16 antenna and the hair on the back of my neck. Mr. Gelb
17 demanded the return of the file and I said, you know, let
18 me work with this file here, I'll make a copy and I'll send
19 you the copy. "No, send me back the original file." Now I
20 thought that was odd, you know, to whatever, and then when
21 I got deeper into it, then I said to myself, well now I
22 understand why the originals of things are significant,
23 because whether the original was in his hand or not became
24 an issue that I had to find. There is no requirement that
25 I get an affidavit from prior counsel, I knew that Mr.

1 Sandusky, being a thorough fellow that he is, was going to
2 reach out to him and say why didn't you use this
3 information.

4 The other thing, quite frankly, Judge, is, that I
5 had two documents, I had the typed version, which was in
6 the file, but I had no evidence that it had been used or
7 referred to by Gelb. I had the handwritten notes, which
8 were marked at Ms. Hill's request, and which the transcript
9 said Mr. Gelb had at one time in his hands and referred to
10 it. So I knew he had G, Defense Exhibit G, the handwritten
11 notes. I didn't have anything tying him into the
12 typewritten version, both of which came out of the file.
13 So I wanted the DA to do the investigation for me and to
14 find out from Mr. Gelb what the story was. And then if Mr.
15 Gelb said, "I've never seen the typed version and I've
16 never seen any other version," well then I would go to the
17 transcript and that's why we have replies.

18 So basically, Judge, I was waiting for the record
19 to be clarified. I was confident that the District
20 Attorney would inquire, and there is no legal requirement
21 that I get an affidavit from him. The facts are clear on
22 the record.

23 I would also point out, Judge, they talk about
24 *Satterfield*, the Court of Appeals said in *Turner*,
25 *Satterfield* is not an excuse for the DA to make up any old

1 did say back in 1999 that Hanzlik didn't do it, even though
2 Meldish did it," boom, Murray Richman's defense is gone,
3 Joe Meldish's defense is gone.

4 So there is a legitimate basis to inquire whether
5 that's the second option, whether he deliberately sabotaged
6 her case out of fear or to protect the co-defendant. I
7 don't know what it is, Judge, but I've been doing this for
8 30 years on this side of the table and there is no way that
9 I'm not using that statement, move for a separate trial if
10 you have to, but you have to use the statement. If the
11 jury hears that Thiong, the main witness, said he wasn't
12 there, it's going to be a different case.

13 So, Judge, under the state's standard of, "Was
14 there meaningful representation?" I think the answer is
15 no. It's not just another little piece, it's a huge piece,
16 it's an alibi that's believable and credible and it would
17 have had her walk out the door. And either under Federal
18 or State standard, she's entitled to a new trial.

19 THE COURT: Mr. Sandusky.

20 MR. SANDUSKY: May it please the Court. I
21 believe Mr. McMahon hits the nail on the head when he said
22 the question is, why didn't Jonas Gelb ask about this DD5.
23 And you're entitled to, this is a situation where you're
24 actually, you're called upon to speculate. He didn't
25 provide an affidavit from Mr. Gelb explaining the conduct